Petition

81-482

Docket No.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARL CAHILL and
LENORE L. CAHILL
Petitioners

V

CITY OF CHESAPEAKE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Paul M. Lipkin
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CARL CAHILL and
LENORE L. CAHILL

Petitioners

v.

CITY OF CHESAPEAKE

Respondent

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TO THE SUPREME COURT OF VIRGINIA

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Counsel for Petitioners

1. THE QUESTIONS PRESENTED FOR REVIEW

a. Does a city ordinance requiring a homeowner to connect to the city water line deprive that homeowner of his property without due process of law where the homeowner has a well providing him with good and sufficient water?

b. Does a state statute enabling a city to pass an ordinance requiring the connection of premises with facilities provided for furnishing water contravene the due process clauses of the Fifth and Fourteenth Amendments as to those persons whose premises have their own water facilities?

c. Can a homeowner be required to pay to a city water connection fees when he neither wants the city water nor needs the city water?

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4. JURISDICTION

The decision of the Supreme Court of Virginia was rendered on the 12th day of June, 1980. This Petition follows within 90 days thereof. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (3).

5. MATERIAL PROCEEDINGS AND OPINIONS BELOW

In 1975 the City filed its Notice of Motion for Judgment against the Cahills in the Chesapeake, Virginia General District Court suing for the recovery of $501.25 alleging "That the defendant (sic) has failed to pay utility connection fees as required by Section 28-21 of the City Code for the defendant's (sic) premises...."

From an adverse judgment on November 14, 1978, the City appealed to the Circuit Court of the City of Chesapeake.

At the trial on February 5, 1979 before a jury, counsel for the Cahills moved

for the separation of witnesses. Over his objection "a representative for the Utility Department", the Utility Director of the City was allowed to remain in the courtroom. Exception was noted.

After all the evidence, the Honorable James C. Godwin dismissed the jury and took the matter under advisement allowing time for counsel to file briefs.

Thereafter, on June 6, 1979, Judge Godwin wrote counsel the following letter:

> "Gentlemen:
>
> After reviewing the Briefs filed in the above captioned matter, I have concluded that the City is entitled to judgment against the defendants. I would appreciate Mr. Hallman preparing an Order preserving defendants' exception.
>
> Yours very truly,
> /s/
> James C. Godwin"

In accordance with this ruling, a final judgment Order was entered on July 10, 1979 to which the Cahills timely noted their

appeal to the Supreme Court of Virginia. In their Petition for Appeal, the Cahills raised the constitutional questions raised in this Petition for Certiorari. While an appeal to the Supreme Court of Virginia was granted, the appeal was limited to the consideration of only one assignment of error and that was not one raising the constitutional issues addressed herein.

Upon briefs and oral argument, the Supreme Court of Virginia affirmed the judgment of the trial court without opinion by the entry of the following order on June 12, 1981:

> "This day came again the parties, by counsel, and, having considered the assignment of error and the arguments of counsel, the Court is of opinion that the City of Chesapeake has the authority to compel the landowners to connect with the municipal water supply system, McMahon v. City of Virginia Beach, 221 Va. 102, 267 S.E.2d 130 (1980), and that Code § 15.1-839 grants the City the power to assess a connection fee upon such

landowners, even though they have not connected, have not contracted to connect, and are not using nor intending to use the municipality's water or water service.

Accordingly, the judgment is affirmed. The appellants shall pay to the appellee damages according to law and the costs expended herein.

This order shall be certified to the said circuit court."

6. PERTINENT REFERENCES

a. Amendment V of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

public use, without just compensation.

b. Amendment XIV of the United States Constitution

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

c. Code of Virginia of 1950, as amended

§ 15.1-875. Water supplies and facilities. -- A municipal corporation may provide and operate within or without the municipal corporation water supplies and water production, preparation, distribution and transmission systems, facilities and appurtenances for the purpose of furnishing water for the use of the inhabitants of the municipality; may contact with others for such purposes and services; may require the connection of premises with facilities provided

for furnishing water; may charge and collect compensation for water thus furnished; and may provide penalties for the unauthorized use thereof.

No municipal corporation, after July one, nineteen hundred seventy-six, shall construct, provide or operate without the boundaries of such municipal corporation any water supply system prior to obtaining the consent of the county or municipality in which system is to be located; provided, however, no consent shall be required for the operation of any such water supply system in existence on July one, nineteen hundred seventy-six, or in the process of construction or for which the site has been purchased or for the orderly expansion of such water supply system.

In any case in which the approval by such political subdivision's governing body is withheld the party seeking such approval may petition for the convening of a special court, pursuant to §§ 15.1-37.1:1 through 15,1-37.1:7 of the Code of Virginia. (Code 1950 (Suppl.), §15-77.39; 1958, c. 328; 1962, c. 623; 1975, c.573; 1976, c.69.)

d. Code of Virginia of 1950, as amended

§ 15.1-873. Purposes for which

powers conferred. -- A municipal corporation, in order to secure, preserve and promote health, safety, welfare, comfort, convenience, trade, commerce and industry in the municipality, and among the inhabitants thereof, may exercise the powers and provide and operate the facilities and establishments set forth in this article. (Code 1950 (Suppl.), § 15-77.37; 1958, c.328; 1962, c.623.)

e. City Ordinance of the Code of the City of Chesapeake, Virginia

Sec. 28-11. Required connection with city's water and sanitary sewer facilities.

The owner or tenant of an improved lot, within the city, bordering upon a street or alley along which a public water or sanitary sewer line or both has been laid or which may hereafter be laid by the city or others, shall cause the same to be connected with such public water and sanitary sewer line. It shall be deemed unlawful to use private wells, septic tanks or similar methods for domestic use where city water and sanitary sewer lines are available for connection thereto.

Connections shall be at the expense of the owner and made within six months from the time that public lines are actually available for

> rendering service. The department of public utilities shall cause a written notice to be served upon the owner or tenant of any lot, lots or other premises to which water and sanitary sewer service are to be made available. The notice shall state when the connection is to be made. If the owner of any such lot, lots or other premises be unknown or absent, the connection shall be made by the tenant or agent thereof.

7. STATEMENT OF THE CASE

For twenty-one (21) years, the Cahills and their family obtained and used pure, good-tasting water from their private well. This was their sole source of water, with no apparent harmful effect upon them.

In November 1972, the City's Department of Public Utilities caused a Notice to be sent to the Cahills to the effect that City water would become available to them about February 15, 1973, and that the mandatory connection ordinance (Section 28-11, City Code) required

them to connect to the City line. The cost of connection was set out in the notice with a discount offered if they "signed up" within a specified time.

A second notice was sent in September 1973, telling the Cahills that the construction had been completed and that they had ten days to connect at the reduced fee.

The Cahills did not connect. They did not apply to connect. They did not contract to connect. They did not and do not want to connect. They want to continue to use their sweet-tasting water. They are, however, connected to the City's sewer system.

Section 28-11 of the City Code adopted December 9, 1969, purports to require property owners to connect to the City water system within six months from the time that public lines are available, and makes it unlawful to use private wells where City water is available.

The City brought suit to recover of

the Cahills the sum of $501.25 purportedly computed by application of Section 28-21 of the City Code. The City appealed an adverse decision of the Chesapeake General District Court, Civil Division.

The Cahills pursued their claim of unconstitutional taking in their petition for appeal to the Supreme Court of Virginia. Although an appeal was granted by the Virginia Supreme Court, that Court specifically rejected the appeal on constitutional grounds.

On the non-constitutional grounds, the Supreme Court of Virginia affirmed the adverse judgment against the Cahills on June 12, 1981.

8. REASONS FOR GRANTING THE WRIT

Petitioners have a constitutional right to the full use and enjoyment of their wells.

The Fourteenth Amendment provision which prevents any action by a state that would

deprive a person of his property without due process of law protects such person from oppressive city ordinances as well as state statutes. Gladstone v. Galton, 145 F.2d 742 (9th Cir. 1944); Tampa N. R. Co. v. Tampa, 91 Fla. 241, 107 So.364 (1926); George v. Portland, 114 Or. 418, 235 P. 681 (1925).

Municipal ordinances adopted under state authority constitute state action and are within the prohibitions of the Fourteenth Amendment. Lovell v. Griffin, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938). Thus the Chesapeake mandatory connection ordinance must bear up under due process scrutiny.

The threshold question of the due process guaranty as it relates to property rights is what is property.

Since the Federal Constitution does not create property interests but rather provides safeguards to such interests, one must turn to state law, be it statutory, case law or whatever, to determine what is "property"

that is entitled to such protection. Leis v. Flynt, 439 U.S. 438, 58 L.Ed.2d 717, 99 S.Ct. 698 (1979).

It is beyond argument that in Virginia the use and enjoyment of one's well and the water on one's land is "property." See Clinchfield Corp. v. Compton, 148 Va. 437, 139 S.E. 308 (1927); Couch v. Clinchfield Corp., 148 Va. 455, 139 S.E. 314 (1927); Heninger v. McGinnis, 131 Va. 70, 76, 108 S.E. 671 (1921).

Having determined that Petitioners have a "property" in their wells and the water derived therefrom, the next question is whether the City's mandatory connection ordinance "deprives" them of such property.

> "The determination whether there has been a deprivation of property for purposes of constitutional guaranties protecting against deprivation, is frequently difficult. Burdens and expenses may within reasonable and constitutional limits be imposed on property, and emergency invasions or limitations of the use of property have been sustained. Moreover, an act, in order to violate the

guaranty of due process, must have some actual operations, and a provision of a state constitution which is only declaratory of what is in fact the law cannot unlawfully deprive a person of his property. But the concept of "confiscation" is opposed to the due process clause of the Fifth Amendment. And wherever the operation and effect of any general regulation is to extinguish or destroy that which by the law of the land is the property of any person, so far as it has that effect, it is unconstitutional and void. Thus, a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives an owner of one of its essential attributes, destroys or impairs its value, restricts or interrupts its common, necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value. The imposition of unreasonable conditions upon the use of property is unconstitutional as in effect depriving the owner of his property, even without any actual taking. In short, any significant taking of property by the state is within the purview of the due process clause of the Fourteenth Amendment, as long as a property deprivation is not de

> minimus, its gravity is irrelevant to the question whether account must be taken of the due process clause. The prohibition is the constitution is as applicable where an owner is partially deprived of the use of his property as where he is wholly deprived of it; taking a part is as much forbidden as taking the whole." 16A Am.Jur. 2d, Constitutional Law, §586, pp. 511 et seq. (omitting citations).

The City ordinance makes it unlawful for Petitioners to use their private well for domestic use once city water lines are available for connection thereto. In addition, they are required to pay a connection fee, to pay an installation fee, to pay a fee for the water line in the street based upon foot frontage and to pay a service fee. This is certainly a "deprivation" within the constitutional context.

Therefore, except under the exercise of its police power, neither the State nor the City has the power to deprive Petitioners of their well and the water taken therefrom.

When a statute is challenged on nonprocedural grounds as violative of due process, the question is whether there is some fair, just and reasonable connection between it and the promotion of the health, comfort, safety and welfare of society. Health Ins. Asso. v. Harnett, 44 N.Y. 2d 302, 405 N.Y.S. 2d 634, 376 N.E.2d 1280 (1978).

"To evaluate its reasonableness we... need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." Goldblatt v. Hempstead, 369 U.S. 590, 595, 82 S.Ct. 987, 990, 8 L.Ed.2d 130, 134 (1962).

The Virginia Supreme Court held in Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955), that legislation mandating termination of the use of private wells was immune to due process attack. In support of

its holding Craft cited Hutchinson v. City of Valdosta, 227 U.S. 303, 33 S.Ct. 290, 57 2.Ed 520 (1913). But Craft's reliance on Hutchinson was misplaced for Hutchinson found no due process violation of a mandatory sewer connection law. It did not deal with water connection.

That distinction was the basis of the decision in City of Midway v. Midway Nursing & Con. Ctr., Inc., 230 Ga. 77, 195 S.E.2d 452 (1973). There in 195 S.E.2d at 454, the Georgia Supreme Court stated:

> "We recognize the authorities cited...including Hutchinson v. City of Valdosta...relied on by the city in the present case, for the proposition that a municipal corporation may compel connection to a public drain or sewer in the exercise of its police power. However, the city cites no case supporting the proposition that a municipal corporation can dictate to its citizens the use of city supplied water....
>
> "In our opinion the very nature of the things involved requires a distinction between compelling the use of a city system to dispose of waste products, which may by their nature constitute a health hazard,

> and compelling the use of city-supplied water, whether it be for human consumption or otherwise. While we recognize that a municipality can, in the exercise of its police power, make reasonable regulations to protect its citizens, including measures designed to preclude the use of water unfit for human consumption or other use, as obtained from a user's private source, or as supplied to a user by others, we see no reason to recognize a claim for injunctive relief or declaratory judgment by the city absent some indication from the claim, as alleged, to show that some reasonable basis exists for protecting the health and welfare of its citizens in this manner."

The Craft holding was made in the context of a factual situation which disclosed that the subsurface wells involved were on lots where septic tanks, cesspools and outdoor toilets were maintained and that the water from many of the wells involved (including the appellant's) had at one time or another been contaminated and unfit for human consumption. On the contrary here, the evidence is to the effect that both the quantity and quality of the Petitioners'

well water was good. Therefore, Midway is more appropriate for a due process holding than Craft.

Moreover, it is not factually indicated that the police power mandates the affirmance of the Virginia Supreme Court's decision. For some twenty (20) years, the Cahills have used their private well, which has produced pure, good-tasting water which the Cahills prefer to city water. This has been the sole source of water to the Cahill family with no harmful effect. They wish to continue using their well for domestic purposes.

9. CONCLUSION

Petitioners' well and the water therefrom are property of which they cannot be deprived without due process. The Chesapeake ordinance imposes such restraints upon Petitioners as to deprive them of their property. While a valid exercise of the police power resulting in expense or loss of property is not

a taking of property without due process of law within the meaning of the Fourteenth Amendment, the ordinance in question is not such a valid exercise. It is not reasonably calculated to protect against a non-existent health menace. It is merely calculated to raise funds for the City to pay for the water system. As such it does not enjoy the protection of the Fourteenth Amendment and should be struck down.

Respectfully submitted,

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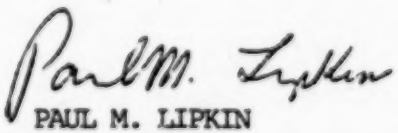
Post Office Box 3505
Norfolk, Virginia 23514-3505

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petition for Writ of Certiorari to the Supreme Court of Virginia upon counsel for the Respondent, Ronald S. Hallman, City Attorney, City of Chesapeake, Civic Center, Chesapeake, Virginia 23320, by depositing copies of said Petition for Writ of Certiorari in the United States Mail, properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served on or before the 9th day of September, 1981.



PAUL M. LIPKIN
Of Counsel for
Petitioners

APPENDIX

APPENDIX A

Re: City of Chesapeake, Virginia
vs. Carl Cahill, et al
at Law No. 6362-Appeal

Gentlemen:

After reviewing the Briefs filed in the above captioned matter, I have concluded that the City is entitled to judgment against the defendants. I would appreciate Mr. Hallman preparing an Order preserving Defendants' exception.

Yours very truly,

/s/
James C. Godwin

APPENDIX B

FINAL ORDER

THIS CAUSE came on this day to be heard on the Motion for Judgment filed by the plaintiff, was argued by counsel and Memoranda of Law duly filed.

It appearing to the Court upon consideration of the evidence and Memoranda submitted that the plaintiff is entitled to judgment against defendants, it is ORDERED and ADJUDGED that judgment be so entered in favor of the plaintiff in the amount of $430.00, to which the defendants note their exception.

And the defendants, having indicated to the Court their intention to petition for appeal to the Supreme Court of Virginia from the judgment of this Court, no execution shall issue herein on said judgment until the expiration of thirty (30) days from the date of the entry hereof, and thereafter until final adjudication in the appellate process so long as defendants

timely pursue their appeal.

It is further ORDERED that the transcript of the trial be made a part of the record when filed.

ENTER: July 10, 1979

s/ James C. Godwin
Judge

APPENDIX C

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 5th of March, 1980.

CARL CAHILL, et al., Appellants,

against Record No. 791491
Circuit Court No. L-6362-A

City of Chesapeake, Appellee

From the Circuit Court of the City of Chesapeake

Upon the petition of Carl Cahill and Lenore L. Cahill an appeal is awarded them from a judgment rendered by the Circuit Court of the City of Chesapeake on the 10th day of July, 1979, in a certain motion for judgment then therein depending, wherein the City of Chesapeake was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said court below in the penalty of $500, within 15 days of the date of this order, with conditions as the law directs.

This appeal, however, is limited to the consideration of assignment of error No. 1 which reads as follows:

1. The court erred in ruling that the City has sufficient legal authority to charge and collect a connection fee where the homeowner has not connected, has not contracted to connect, and is not using nor intending to use the City's water or services.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 1, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

APPENDIX D

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of June, 1981.

CARL CAHILL and
LENORE L. CAHILL, Appellants,

against Record No. 791491
Circuit Court No. L6362-A

CITY OF CHESAPEAKE, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Chesapeake on the 10th day of July, 1979.

This day came again the parties, by counsel, and, having considered the assignment of error and the arguments of counsel, the Court is of opinion that the City of Chesapeake has the authority to compel the landowners to connect with the municipal water supply system, McMahon v. City of Virginia Beach, 221 Va. 102, 267 S.E. 2d 130 (1980), and that Code § 15.1-839 grants the City the power to assess a connection fee upon such landowners, even though they have not connected, have not contracted to connect, and are not using nor intending to use the

municipality's water or water service.

Accordingly, the judgment is affirmed. The appellants shall pay to the appellee damages according to law and the costs expended herein.

This order shall be certified to the said circuit court.

Opposition

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Docket No. 81-482

In the Supreme Court of the United States

October Term, 1981

CARL CAHILL and
LENORE L. CAHILL
Petitioners

V

CITY OF CHESAPEAKE
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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No. 81-482

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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LENORE L. CAHILL

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of the City of Chesapeake
City of Chesapeake, Virginia,
a municipal corporation,
Plaintiff
vs.
Carl Cahill and
Lenore L. Cahill,
Defendants.
Before Hon. James C. Godwin,
Judge, and jury.
Chesapeake, Virginia
February 5, 1979
Jaime, Browning & Associates, Inc.
Court Reporters
Certified Shorthand Reporters
Virginia Beach, Virginia

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THE CITY OF CHESAPEAKE

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a municipal corporation
Plaintiff
vs. AT LAW NO. 6362-Appeal
CARL CAHILL and
LENORE L. CAHILL
Defendants

Appendix C..... A.5
Order of Supreme Court of Virginia awarding appeal from judgment rendered by Circuit Court of the City of Chesapeake

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Supreme Court of Virginia Order affirming decision of the Circuit Court of the City of Chesapeake

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MATERIAL PROCEEDINGS AND OPINIONS BELOW

There are two cases which were decided in the Virginia Supreme Court which are relevant to the Petition now before this Court. They will be explained in order to place the present controversy in proper context.

In the first case, Carl Cahill in 1977 requested a Declaratory Judgment from the Chesapeake, Virginia, Circuit Court, attempting to have the court declare that Chesapeake City Code Section 28-11 was illegal and unconstitutional. (Carl Cahill v. City of Chesapeake, Virginia, In Chancery No. 15193, Record No. 78-0529.) That ordinance requires mandatory connection with the City's water system when the service becomes available. The Circuit Court accepted Memoranda of Law from both parties and the question as to the constitutionality of the section was fully litigated. By

Final Order dated January 1, 1978, Mr. Cahill's Bill for Declaratory Judgment was dismissed. The Petitioner then filed an Appeal with the Virginia Supreme Court, again raising the issue of whether the mandatory connection requirement offended provisions of the Virginia and Federal Constitutions. The Virginia Supreme Court on August 1, 1978, refused the Petition for Appeal, "finding no reversible error." Petitioner did not pursue the matter of constitutionality further.

The second case is the one presently before this Court. The City had filed a Motion for Judgment against the Cahills in the Chesapeake General District Court for $501.25 due by reason of their failure to pay water connection fees as required by Section 28-21 of the City Code. The General District Court ruled in favor of the Cahills, from

which judgment the City appealed to the Chesapeake Circuit Court. During the trial, in response to a question from the Judge, counsel for the Cahills stated:

> ...my point is this, that they say they have a mandatory connection ordinance, but they are not in this case enforcing the mandatory nature of the ordinance. This isn't a case to compel the connection. This is merely a case to compel the payment of money or to get a judgment for money, so it is not the test of the mandatory nature of the ordinance.... (Appendix A).

Further, in Petitioners' Memorandum of Law, they stated, "It is true that the question of the requirement of connection is not an issue. The sole question is whether the defendant homeowners are indebted to the City even before they have connected...." (Appendix B).

The trial briefs are totally devoid of constitutional questions. The Honorable Judge James C. Godwin rendered

judgment against the Petitioners with no opinion on June 6, 1979. The Cahills then appealed to the Virginia Supreme Court. It was in that Petition that the Cahills alleged (as they had in the first case noted above) that the City Code Sections 28-11 and 28-21 were unconstitutional, along with the allegation that the City had no power to collect these fees. Following familiar principles of Virginia law which barred the raising of issues for the first time on appeal, the Virginia Supreme Court, in granting an appeal, limited the same to the sole question concerning the City's authority to collect the fee. (Appendix C). The word "unconstitutional" was not mentioned in the appeal briefs, and no constitutional references were cited. Therefore, the only question briefed, argued and specifically decided upon by the Virginia Supreme Court related to the City's

power under state law to collect a water connection fee, as is evident in the Court's opinion dated June 12, 1981, affirming the judgment. (Appendix D).

From that decision, the Petitioners seek a Writ of Certiorari.

STATEMENT OF THE CASE

Respondent agrees with the Petitioners' Statement of the Case with the exception of the next-to-last paragraph of their brief (p. 15). Respondent notes that the Petitioners originated the claim of unconstitutional taking in their Petition for Appeal to the Supreme Court of Virginia.

REASONS FOR REFUSING TO GRANT THE WRIT

The federal question that the Petitioners allege is at issue, if any exists, was neither timely nor

> properly raised, thereby depriving this Court of jurisdiction.

The Petitioners' jurisdictional basis, 28 U.S.C. § 1257 (3), authorizes the granting of a writ of certiorari "...where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States...." Furthermore, Supreme Court Rule 21.1.(h) requires a petitioner to state:

> The stage in the proceedings; both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears...as will show that the federal question was timely and properly raised so as to

> give this Court jurisdiction to review the judgment or writ of certiorari.

It must appear that the federal question was brought to the attention of the lower court and decided by it or that it was necessary to the determination of the cause. California Powder Works v. Davis (1894) 151 U.S. 389, 38 L. ed. 206, 14 S. Ct. 350.

The general rules as to how it may be shown that a state court decision asserted the necessary federal question have been used consistently by this court. The first step is that the record must show that the question was actually presented or arose in the case. Durley v. Mayo (1956) 351 U.S. 277, 100 L. ed. 1178, 76 S. Ct. 806, reh. den. 352 U.S. 859, 1 L. ed. 2d 69, 77 S. Ct. 22. The second essential step is to show from the record that the state court actually

passed upon and decided this question. Black v. Cutter Laboratories, (1956) 351 U.S. 292, 100 L. ed. 1188, 76 S. Ct. 824, reh. den. 352 U.S. 859, 1 L. ed. 2d 69, 77 S. Ct. 21. The Supreme Court will not find jurisdiction on surmise as to what, if any, federal question the state court rested its decision upon. Lynch v. New York, (1934) 293 U.S. 52, 79 L. ed. 191, 55 S. Ct. 16. It is not sufficient that the Petitioner filed his State Supreme Court brief with the United States Supreme Court in which he asserted constitutional grounds and stated so in his oral argument to the United States Supreme Court. Live Oak Water Users' Asso. v. Railroad Com. of Calif., (1926) 269 U.S. 354, 70 L. ed. 305, 46 S. Ct. 149. It must affirmatively appear that in the court below there was duly drawn in question the validity of a statute of, or authority exercised under a state

statute, because of its repugnance to the Constitution, treaties or laws of the United States. These matters are not a part of the record and are not adequate to create a federal question when no such question was necessarily decided by the state court. Id. Where under state practice, the highest court refuses to consider a question not raised in the trial court, it cannot be raised in this court. Layton v. Mo., (1902) 187 U.S. 356, 47 L. ed. 214, 23 S. Ct. 137. This is exactly what happened in the Virginia Supreme Court when the Cahills attempted to initiate a rehearing of the same question that had been previously litigated.

From a review of the Cahills' Petition, as well as records of the trial and appellate courts, it is evident that the Petitioners failed to raise a federal statutory or constitutional issue below. The requirements of 28 U.S.C. § 1257 (3),

the Supreme Court Rules and above cited decisions therefore have not been met as a prerequisite for the issuance of a writ of certiorari.

The decision below was based upon adequate independent state grounds, thereby depriving this court of jurisdiction.

This court will avoid the necessity of reaching constitutional issues if at all possible. Armstrong v. Armstrong, (1956) 350 U.S. 568, 100 L. ed. 705, 76 S. Ct. 629. This court's principle that it will not review judgments of state courts which rest upon adequate independent state grounds is observed scrupulously. Herb v. Pitcairn, (1945) 324 U.S. 117, 89 L. ed. 789. There is not jurisdiction to review holdings of the state court which concern matters of state law and amount at most to alleged erroneous construction of statutes of a state by its own courts. Neblett v.

Carpenter, (1938) 305 U.S. 297, 83 L. ed. 182, 59 S. Ct. 179 reh. den. 305 U.S. 675, 83 L. ed. 437, 59 S. Ct. 335. Where there is no opinion and it appears that the judgment may have rested upon a non-federal question, the Supreme Court will not take jurisdiction even though the existence of such an adequate state ground is debatable. Stembridge v. State of Ga., (1952) 343 U.S. 541, 96 L. ed. 1130.

The decision rendered by the Virginia Supreme Court on June 12, 1981, was based entirely upon the authority of a city to make such charges under state law, namely, Virginia Code Section 15.1-839. (Appendix D). Thus an adequate and independent state ground was specifically stated.

> There are no special and important reasons in this controversy to justify the issuance by this Court of a writ of certiorari.

The grant of a writ of certiorari is "...not a matter of right but of judicial discretion and will be granted only when there are special and important reasons therefor." Supreme Court Rule 17. Special and important reasons which may justify the grant of a writ of certiorari by the Supreme Court under Rule 17 imply a reach to a problem beyond the academic or the episodic; the court does not sit to satisfy a scholarly interest in issues nor for the benefit of the particular litigants. Rice v. Sioux City Memorial Park Cemetery, (1955) 349 U.S. 70, 99 L. ed. 897, 75 S. Ct. 614.

While Petitioners have certainly alleged a constitutional violation of their rights, it is submitted that the mere imposition and collection of utility connection fees pursuant to state enabling law does not create the basis for the grant by this court of the

extraordinary writ of certiorari. This is a matter for state judicial and legislative decision-making and a determination by this Court is not justified.

CONCLUSION

The Respondent submits that a writ of certiorari should not be granted in this cause for the following reasons:

1. The Petitioners have failed to demonstrate in their petition the manner in which or the stage of the proceedings in either the court of first instance or the appellate court at which the alleged federal question was raised. The reason Petitioners failed to comply with Supreme Court Rule 21.1. (h) is that the alleged federal question was never raised in the court of first instance and was only attempted to be interjected on appeal to the Virginia Supreme Court in violation of procedural rules set forth in state

law. Consequently, the federal question, if any exists, was neither timely nor properly raised, thus depriving this Court of jurisdiction.

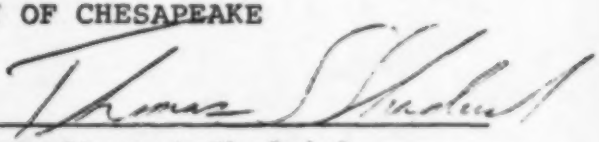
2. There is no federal question involved. The only legal issues involved in this litigation concern the substantive law of the State of Virginia, pertaining to the authority of a municipality to charge and collect water connection fees. Adequate independent grounds based upon state law existed for the Virginia Supreme Court's decision, thus depriving this Court of jurisdiction.

3. There are no special and important reasons for the issuance of a writ of certiorari as contemplated under Supreme Court Rule 17. The record shows that the Virginia Court decisions were solely addressed to the power of a municipal water system to prescribe and charge fees for its services. Past

State Court decisions were followed and no substantial reason for overturning these has been shown.

Respectfully submitted,

CITY OF CHESAPEAKE

By 

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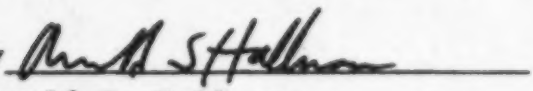
By 

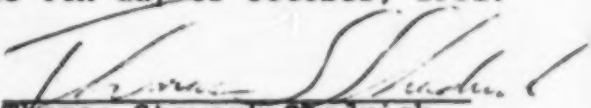
Ronald S. Hallman
City Attorney
CITY OF CHESAPEAKE
Post Office Box 15225
Chesapeake, Virginia 23320

Counsel for Respondent

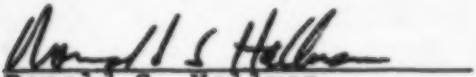
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Brief upon counsel for the Petitioners, Paul M. Lipkin, GOLDBLATT, LIPKIN, COHEN, ANDERSON, JENKINS AND LEGUM, P. C., 415 St. Paul's Boulevard, Post Office Box 3505, Norfolk, Virginia 23514-3505, by depositing copies of said Brief in the United States mail, properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served on or before the 6th day of October, 1981.



Thomas Stewart Shadrick



Ronald S. Hallman

Of Counsel for Respondent

APPENDIX

APPENDIX A

REPORTER'S TRANSCRIPT

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

CITY OF CHESAPEAKE, VIRGINIA,
a municipal corporation,
Plaintiff,

vs. RECORD.

CARL CAHILL
and
LENORE L. CAHILL,
Defendants.

Before Hon. James C. Godwin, Judge,
and jury.
Chesapeake, Virginia
February 5, 1979

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Virginia Beach, Virginia.

that you would receive a two-inch line for $80. Well, you said I've got to add it and everybody says you got to add it and put a three-inch line, of course, the cost would go up, but I think really what we're dealing with is just basically whether or not the city has the right to do this.

MR. LIPKIN: Yes, sir. That's true, your Honor, and my point is this, that they say they have a mandatory connection ordinance, but they are not in this case enforcing the mandatory nature of the ordinance. This isn't a case to compel the connection. This is merely a case to compel the payment of money or to get a judgment for money, so it is not the test of the mandatory nature of the ordinance, and I contend that they have not earned the money and there is no statute, no ordinance which can authorize them to get a judgment for that money until we are connected; and if they can enforce the mandatory nature, then make us connect and then they're entitled to their money; but what they're saying is pay us the money, and I think that the suit is misplaced, it's improper. We haven't -- the city hasn't earned the money, they're not entitled to the money.

APPENDIX B

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

CITY OF CHESAPEAKE, VIRGINIA,
a municipal corporation
Plaintiff

vs. AT LAW NO. 6362-Appeal

CARL CAHILL and
LENORE L. CAHILL
Defendants

MEMORANDUM OF LAW OF DEFENDANTS

Plaintiff City brought suit against the Cahills alleging that they had failed to pay utility connection fees as required by Section 28-21 of the City Code. As stated by plaintiff in its Memorandum, the issue to be addressed is whether or not the City has sufficient legal authority to charge and collect such connection fees where the homeowner has not connected.

It is true, as stated by plaintiff in its Memorandum, that the question of requirement of connection is not an issue. The sole question is whether the defendant

homeowners are indebted to the City even before they have connected and when they are not using the City's water or services and have not contracted so to do.

APPENDIX C

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 5th of March, 1980.

CARL CAHILL, et al., Appellants,

against Record No. 79-1491
Circuit Court No. L-6362-A

CITY OF CHESAPEAKE, Appellee

Upon the petition of Carl Cahill and Lenore L. Cahill an appeal is awarded them from a judgment rendered by the Circuit Court of the City of Chesapeake on the 10th day of July, 1979, in a certain motion for judgment then therein depending, wherein the City of Chesapeake was plaintiff and the petitioners were defendants; upon the petitioners, or someone for them, entering into bond with sufficient security before the clerk of the said court below in the penalty of $500, within 15 days of the

date of this order, with conditions as the law directs.

This appeal, however, is limited to the consideration of assignment of error No. 1 which reads as follows:

1. The court erred in ruling that the City has sufficient legal authority to charge and collect a connection fee where the homeowner has not connected, has not contracted to connect, and is not using nor intending to use the City's water or services.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 1, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this appeal is awarded.

The petition for appeal is refused

as to the remaining assignments of error.

APPENDIX D

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of June, 1981.

CARL CAHILL and
LENORE L. CAHILL, Appellants,

against Record No. 79-1491
Circuit Court No. L-6362-A

CITY OF CHESAPEAKE, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Chesapeake on the 10th day of July, 1979.

This day came again the parties, by counsel, and, having considered the assignment of error and the arguments of counsel, the Court is of opinion that the City of Chesapeake has the authority to compel the landowners to connect with the municipal water supply system, McMahon v. City of Virginia Beach, 221 Va. 102, 267 S.E. 2d 130 (1980), and that Code § 15.1-839 grants the City the power

to assess a connection fee upon such landowners, even though they have not connected, have not contracted to connect, and are not using nor intending to use the municipality's water or water service.

Accordingly, the judgment is affirmed. The appellants shall pay to the appellee damages according to law and the costs expended herein.

This order shall be certified to the said circuit court.